

LE (Migration) [2020] AATA 5269 (1 October 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr VAN MANH LE

VISA APPLICANT: Mrs THI THE HUONG VO

CASE NUMBER: 1830400

DIBP REFERENCE(S): BCC2017/3255973

MEMBER: Hugh Sanderson

DATE: 1 October 2020

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations; and
- cl.309.221 of Schedule 2 to the Regulations.

Statement made on 1 October 2020 at 11:30am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and ongoing relationship – limited sharing of financial resources – evidence of regular communication – social recognition of the relationship – birth, care and support of their child – plans to purchase their home – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 October 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 7 September 2017 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the parties were in a genuine and continuing relationship.

Background

4. The review applicant was born in Vietnam and is currently 54 years old. He first entered Australia in 1991 and is now an Australian citizen. His mother and four siblings continue to reside in Vietnam. He was previously married and divorced his wife in 2011. There were no children of that relationship.
5. The visa applicant is a citizen of Vietnam and is currently 33 years old. Her parents and brother continue to live in Vietnam. She was previously married and divorced her husband on 15 February 2017. There were no children of that relationship.
6. The parties claimed to have first met each other over the Internet on 2 January 2017. A relationship developed and the review applicant travelled to Vietnam on 7 June 2017. The visa applicant introduced the review applicant to her family and the parties agreed to marry each other. A wedding ceremony took place on 25 June 2017 the parties registered their marriage on 7 July 2017. Members of the review applicant's family as well as the visa applicant's family attended the wedding. The review applicant returned to Australia on 24 July 2017. It was claimed the visa applicant suffered a miscarriage after falling pregnant to the review applicant.
7. Since their marriage, the review applicant has travelled to Vietnam as follows:
 - From 23 May 2018 to 27 June 2018;
 - From 9 December 2018 to 16 January 2019; and
 - From 17 April 2019 to 4 May 2019.
8. An officer from the Department interviewed the visa applicant on 1 August 2018. The officer noted the visa applicant had a good knowledge of the review applicant's life in Australia and a plausible explanation as to why the parties were married so quickly.
9. The delegate who considered the application noted the following:
 - There was little information as to the financial aspects of the relationship;

- Apart from hotel receipts, there was no evidence that the parties had ever established a household together;
 - The photos provided did not indicate the parties were socialising significantly with other family members and the social activities were limited;
 - No statutory declarations were provided in support of the application;
 - The parties committed to the relationship after a very short period of time and there was little information to show any long-term commitment to the relationship; and
 - The reasons for the quick development of the relationship provided by the visa applicant appeared superficial.
10. Taking these matters into account, the delegate was not satisfied that the parties were in a genuine and continuing relationship and that the visa applicant was not the spouse, as defined in s.5F of the Act, of the sponsoring partner. Accordingly, the delegate found the applicant did not meet the criteria in cl.309.211 and refused the application.

Information to the Tribunal

11. The review applicant provided further information to the Tribunal in support of the application including the following:
- Evidence of the parties travelling together in Vietnam and social activities there;
 - Photos of the parties together and with various family members in Vietnam;
 - Chat records of the parties' communication with each other;
 - Statements from friends supporting the application;
 - Evidence of the review applicant sending money to the visa applicant in Vietnam; and
 - Medical records of the parties.
12. The visa applicant gave birth to a son, Hugo Le, on 15 December 2019. The conception of Hugo would likely have taken place over the time that the review applicant was in Vietnam's from 17 April 2019. DNA testing was conducted and confirmed that the review applicant was the father of the visa applicant son.
13. The Tribunal has proceeded to a decision on the matter without the need for a hearing.
14. The review applicant was represented in relation to the review by his registered migration agent.
15. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

16. The issue in the present case is whether the visa applicant is the spouse, as defined in s.5F of the Act, of the review applicant.

Whether the parties are in a spouse or de facto relationship

17. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
18. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

19. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Vietnam. There is nothing to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

20. Neither the visa applicant nor the review applicant has any significant assets of their own. The parties live in separate countries and are, to a large extent, financially independent of each other. As such, it is not surprising that there is little information as to the financial aspects of the relationship.
21. The review applicant has been sending money to the visa applicant as shown by the money transfers. The parties have discussed their financial affairs and are aware of each other's financial situation. The parties have spent time together in Vietnam with the review applicant meeting the expenses of the parties when together. Although limited, the Tribunal accepts that the financial aspects of the relationship in light of the circumstances of the parties is indicative of there being in a genuine and continuing relationship.
22. The parties have spent time together in Vietnam, staying in hotels or together in the homes of the parties' relatives. When interviewed by the Department, the visa applicant provided information as to the parties plans to live together in Australia. Again, although limited, the fact that the parties have spent time living together in Vietnam is indicative of their being in a genuine and continuing relationship and having a mutual commitment to a shared life to the exclusion of all others.
23. The parties provided numerous photos of themselves together with their family members in Vietnam. Statements have been provided in support of the application by relatives. The parties conducted a public wedding ceremony in which they invited family members of both the visa applicant and review applicant. The review applicant has travelled regularly to spend time with the visa applicant in Vietnam. These trips have, unfortunately, not been able to be

continued due to the COVID-19 pandemic. This has unfortunately meant the review applicant has not been able to spend time with his son.

24. Overall, the Tribunal is satisfied that the parties represent themselves to people as being married to each other and that their relationship is recognised by their friends and family as genuine. The parties have undertaken social activities together with their families and friends in Vietnam. The social aspects of the relationship support a finding that the parties have a mutual commitment to a shared life as husband-and-wife to the exclusion of all others and that their relationship is genuine and continuing.
25. The parties have now been married for more than three years. Over that time, the review applicant has travelled to Vietnam to spend time with the visa applicant. They have regularly communicated with each other and are aware of each other circumstances. Most significantly, the parties now have a child together. DNA testing has confirmed that the review applicant is the father of their child. This, more than anything, shows the level of commitment the parties have to each other and that they see their relationship is long-term. The parties are provided a high degree of companionship and emotional support to each other over the process of having the Partner visa application being assessed.
26. The Tribunal has considered all the information before it both individually and cumulatively. As indicated above, the most significant factor in support of finding the parties are in a genuine and continuing relationship is the fact that the parties have had a child together. This fact, together with the other factors set out above, leads the Tribunal to conclude that both at the time of the application and at the time of this decision the parties were in and continue to be in a genuine and continuing relationship and that they have a mutual commitment to a shared life as husband-and-wife to the exclusion of all others. Although they are currently living separately and apart, they intend to live together in Australia.
27. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
28. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
29. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

30. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).